U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MANUELA R. CORTES and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

Docket No. 02-1612; Submitted on the Record;
Issued November 7, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to more than a nine percent permanent impairment to her left arm for which she received a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for left de Quervain's syndrome, left shoulder sprain, cervical strain, left shoulder strain and left rotator cuff tear. She underwent surgery on her left shoulder on August 15, 2000. On November 6, 2000 appellant filed a claim for a schedule award.

On a form dated December 13, 2000, appellant's treating physician, Dr. Marc L. Kahn, a Board-certified orthopedic surgeon, measured the range of motion of appellant's left shoulder, not using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3rd ed. 1990) and did not assess the degree of impairment. He determined that appellant's abduction was 145 degrees, her internal rotation was 20 degrees and her backward elevation and adduction were each 10 degrees.

In a report dated December 1, 2000, the district medical adviser used Dr. Kahn's figures and the A.M.A., *Guides* (5th ed. 2001) to determine that appellant's internal rotation of 20 degrees equaled a 4 percent impairment, Table 16-46, page 479, her extension of 10 degrees equaled a 2 percent impairment, Table 26-40, page 476, her adduction of 10 degrees equaled a 1 percent impairment, Table 16-43, page 477 and appellant's abduction equaled a 1½ percent impairment, Table 16-43, page 477. The district medical adviser totaled the degrees of impairment, 4, 2, 1 and 1½ to obtain a total permanent disability impairment of 8½ percent.

By decision dated April 26, 2001, the Office issued appellant a schedule award of nine percent of the left arm.

By letter dated May 17, 2001, appellant requested an oral hearing before an Office hearing representative, which was held on October 25, 2001. At the hearing, she described the history of her injury and her medical treatment. Appellant stated that her left arm made it

difficult to put a bra on, she had difficulty blow drying her hair, lifting her arm and lifting her grandchildren. She stated that she could lift 10 to 15 pounds with her left arm. Appellant stated that her shoulder, left arm, palm and left thumb were numb every morning. She stated that her arm grinds or cracks when she tries to reach. Appellant was taking medication and working with restrictions, which involved no reaching over her head, no repetitive motion and permitting her to lift less than 15 pounds.

Appellant submitted a report from Dr. David Weiss, an osteopath, dated November 8, 2001. Using the A.M.A., *Guides* (5th ed. 2001), he determined that her four-fifths motor strength deficit for left thumb abduction equaled 9 percent, Table 16-11, page 484, Table 16-15, page 492, appellant's left grip strength deficit was 10 percent, Tables 16-32 and 16-34, page 509, appellant's left shoulder arthroplasty was 30 percent, Table 16-27, p. 506, appellant's range of motion deficit for left shoulder flexion was 1 percent, Figure 16-40, page 476 and appellant range of motion deficit for left shoulder adduction was 4 percent, Figure 16-43, p. 477. He also determined that appellant had a pain related impairment of 3 percent, Figure 18-1, page 574. Adding the percentages of the left upper extremity, 9, 10, 30, 1, 4 and 3, Dr. Weiss obtained a total permanent impairment of the left upper extremity of 49 percent. However, when those figures are added, the correct total is 57 percent.

In a report dated January 11, 2002, the district medical adviser reviewed Dr. Weiss and Dr. Kahn's reports. He noted that appellant underwent arthroscopy of the left shoulder on August 15, 2000 for the preoperative diagnosis of shoulder impingement and that the surgery included subacromial decompression, debridement of the labrum and the rotator cuff. The district medical adviser stated that appellant did not undergo left shoulder arthroplasty as the procedure is defined by orthopedic surgeons of the A.M.A., *Guides* (5th ed. 2001) and, therefore, should not receive an additional permanent impairment of the left shoulder based on shoulder arthroplasty, section 16.7b, page 505, Table 16-27, page 506.

The district medical adviser stated that he reviewed the appropriate figures dealing with the shoulder ranges of motion, Figures 16-40, 16-43 and 16-46, page 476, 477 and 479, respectively and was unable to find objective physical evaluation data or other medical evidence supporting an increase of the previously awarded permanent partial impairment of the left upper extremity.

By decision dated February 20, 2002, the Office hearing representative affirmed the Office's April 26, 2001 decision.

The Board finds that the case is not in posture for decision.

The schedule award provision of the Act[1] and its implementing regulation[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results

[1] 5 U.S.C. § 107 *et seq.*

[2] 20 C.F.R. § 10.404.

and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[3]

Section 8123(a) of the Federal Workers' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[4]

In this case, a conflict exists between the opinion of appellant's treating physician, Dr. Weiss and the opinion of Dr. Kahn regarding the degree of impairment to appellant's left extremity. In his November 8, 2001 report, Dr. Weiss determined that appellant had a 57 percent impairment to his left upper extremity pursuant to the A.M.A., *Guides* (5th ed. 2001), which included a 30 percent impairment for a left shoulder arthroplasty. In his December 1, 2000 report, the district medical adviser applied the A.M.A., *Guides* (5th ed. 1995) to Dr. Kahn's figures on abduction, internal rotation and backward elevation and adduction and determined that appellant had an eight and one-half percent impairment to her left upper extremity. In his January 11, 2002 report, a different district medical adviser reviewed Dr. Weiss' and Dr. Kahn's reports and noted that appellant did not undergo an arthroplasty as the procedure is defined by the A.M.A., *Guides* (5th ed. 2001). He also stated that appellant was not entitled to a schedule award greater than eight and one-half percent. Even if, however, one discounts the 30 percent impairment for an arthroplasty from Dr. Weiss' calculation of the degree of appellant's impairment, his impairment rating to appellant's left upper extremity would be 27 percent. Dr. Weiss' impairment rating of 27 percent conflicts with Dr. Kahn's rating, as interpreted by the district medical adviser, of eight and one-half percent. Due to the conflict between Dr. Weiss' and Dr. Kahn's calculation as to the degree of appellant's impairment to her left upper extremity, the case must be remanded for appellant, with the case record and statement of accepted facts, to be sent to an impartial medical specialist for an evaluation to resolve the conflict. The impartial medical specialist should state his or her findings on appellant's measurements of motion and use the A.M.A., *Guides* (5th ed. 2001), with specific references to Tables and page numbers, to determine the degree of impairment to appellant's left upper extremity. After further development that it deems necessary, the Office should issue a *de novo* decision.

[3] *See id*.; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[4] *Henry W. Sheperd, III*, 48 ECAB 382, 385 n.6 (1997); *Wen Ling Chang*, 48 ECAB 272-74 (1997).

The February 20, 2002 decision of the Office of Workers' Compensation Programs is hereby vacated and the case remanded for further action consistent with this decision.

Dated, Washington, DC
November 7, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member